Supreme Court of Kentucky

2015-SC-000461-D
COURT OF APPEALS CASE NOS. 2013-CA-001695 and 2013-CA-001742

On Appeal from Franklin Circuit Court
Civil Action No. 11-CI-01613

LOUISVILLE GAS AND ELECTRIC COMPANY — APPELLANT

v.

KENTUCKY WATERWAYS ALLIANCE,
SIERRA CLUB, VALLEY WATCH,
SAVE THE VALLEY, AND COMMONWEALTH
OF KENTUCKY ENERGY AND ENVIRONMENT CABINET — APPELLEES

REPLY BRIEF FOR APPELLANT LOUISVILLE GAS AND ELECTRIC COMPANY

John C. Bender
R. Clay Larkin
DINSMORE & SHOHL LLP
250 West Main Street, Suite 1400
Lexington, KY 40507
Telephone: 859-425-1000
Facsimile: 859-425-1099

Sheryl G. Snyder
Jason P. Renzelmann
FROST BROWN TODD LLC
400 West Market Street, 32nd Floor
Louisville, KY 40202-3363
Telephone: 502-589-5400
Facsimile: 502-581-1087

CERTIFICATE OF SERVICE

It is hereby certified that pursuant to CR 76.12(5) that a true copy of this Reply Brief for Appellant was served by First Class U.S. Mail, postage prepaid this 29th day of June, 2016, to Joe F. Childers, Jr., Joe F. Childers & Associates, The Lexington Building, 201 W. Short St., Ste. 300, Lexington, KY 40507; Christopher R. Fitzpatrick, Energy & Environment Cabinet, 2 Hudson Hollow, Frankfort, KY 40601, Counsel for Appellees; Kelly D. Bartley, Bingham Greenebaum Doll LLP, 300 W. Vine St., Ste. 1200, Lexington, KY 40507; Brent R. Baughman, Bingham Greenebaum Doll LLP, 101 S. Fifth St., Ste. 3500, Louisville, KY 40202, Counsel for Amicus Curiae; Amy Feldman, Franklin Circuit Court Clerk, Franklin County Courthouse, 222 St. Clair Street, Frankfort, KY 40601; and Honorable Phillip Shepherd, Chief Circuit Judge, Franklin County Courthouse, 222 St. Clair Street, Frankfort, KY 40601; Sam Givens, Clerk, Court of Appeals of Kentucky, 360 Democrat Drive, Frankfort, KY 40601.

An Attorney for Appellant

STATEMENT OF POINTS AND AUTHORITIES

The Court of Appeals' interpretation of the Clean Water Act ("CWA") is contrary to the CWA's text, purpose, and legislative history, and is utterly unworkable in practice.

I. The plain language of the CWA does not require ad hoc BPJ limits to be imposed on wastestreams that are already regulated by a nationwide ELG.

Like the Majority Opinion, Appellees largely ignore the controlling provision of the CWA itself, Section 402(a)(1), which states BPJ limits are only to be imposed "prior to" the establishment of ELGs. 33 U.S.C. § 1342(a)(1). BPJ limits are only required as an interim measure to bridge the gap when EPA has not yet promulgated any national standards applicable to a particular point source or wastestream.[1] Courts have long recognized that this language means permitting authorities "can no longer establish new BPJ limits for categories of point sources subject to a national guideline."[2]

Appellees' effort to distinguish these cases is unavailing. Appellees emphasize that the issue in the California *NRDC* case[3] was whether EPA had a mandatory duty to promulgate national ELGs for the construction industry, which the court held it did. But the court's rationale was that the CWA intended state BPJ permitting to be a temporary measure, and did not permit EPA to decline to promulgate ELGs indefinitely and thereby burden states with the "ongoing expense of refining their own standards in response to changing conditions and information."[4] That is exactly what the Majority Opinion would do. Under the Majority Opinion, even **after** EPA promulgates an applicable national ELG, states would have a continuous and interminable burden to evaluate, establish, and refine case-by-case BPJ limits on any pollutants not specifically addressed in the ELG.

---

[1] *NRDC v. EPA*, 822 F.2d 104, 111 (D.C. Cir. 1987) (ad hoc BPJ limits are required only "[i]f no national standards have been promulgated for a particular category of point sources").
[2] *NRDC v. EPA*, 859 F.2d 156, 200 (D.C. Cir. 1988).
[3] *NRDC v. EPA*, 437 F. Supp. 2d 1137, 1160-61 (C.D. Cal. 2006).
[4] *Id.* at 1152.

Nor is Appellees' position supported in any way by the fact that the 1988 *NRDC* decision upheld EPA's "anti-backsliding" regulations.[5] The "anti-backsliding" regulations provide that BPJ limits established for a wastestream in a permit **before** the adoption of **any** ELGs applicable to that type of wastestream may not be relaxed if a subsequently enacted ELG is less stringent than the BPJ limit in that permit. Nothing in the *NRDC* opinion, however, suggests that states may be obliged to establish new BPJ limits **after** an applicable ELG is adopted. To the contrary, the court recognized that the statutory language of the CWA "**makes clear that BPJ permits are no longer to be created once national guidelines are in place**," whereas the Act "tells us nothing about the fate of BPJ permit limits established **prior to** the guidelines' promulgation."[6]

If anything, the existence of the EPA's anti-backsliding regulations supports the Cabinet's decision not to impose new BPJ regulations at a time when EPA was in the process of revising the ELGs. In *NRDC v. EPA*, for example, the Ninth Circuit held that EPA was justified in deferring establishment of a BAT standard in a BPJ permit due to the pendency of a new ELG, even though no existing ELGs were in place for the industry, because the anti-backsliding regulation would lock into place potentially irrational or inequitable inconsistencies between the BPT standards and the new ELGs:

> If the EPA were to require as BAT the retrofitting of all drilling sources for reinjection of produced water in the Gulf of Mexico, and, the eventual national standards were less stringent in any respect, there would be an inconsistency between BAT for Gulf drilling and BAT for the rest of the nation's off-shore drilling. This inconsistency would lack any apparent scientific or equitable basis.[7]

There is no question the 1982 ELG applied to Trimble's FGD wastewaters. The

---

[5] *NRDC v. EPA*, 859 F.2d 156 (D.C. Cir. 1988).
[6] *Id.* at 200.
[7] *NRDC v. EPA*, 863 F.2d 1420, 1425 (9th Cir. 1988).

Majority recognized that the "ELG regulating 'low volume waste' from wet scrubbers .... established performance standards and limits on" Trimble's FGD wastewaters.[8] Thus, the plain language of the CWA dictates that no BPJ limits were required.

II. The Cabinet's interpretation is consistent with 40 C.F.R. § 125.3 and applicable EPA guidance.

While both the Majority and the Appellees purport to rely on the "plain language" of 40 C.F.R. § 125.3(c), they are incorrect to claim the regulation "explicitly states" that the Cabinet "must" set BPJ limits whenever an ELG does not apply to "all pollutants" in a given discharge.[9] In fact, the plain language of the regulation states the Cabinet "may" impose effluent limits in a permit through **one of three methods**, the first of which is application of a nationwide ELG, which is what the Cabinet did here.

Nor does Subsection (3) impose a "clear mandatory duty" to impose BPJ limits "for each pollutant discharged," as Appellees claim.[10] The regulation does not contain any compulsory language concerning a "mandatory duty" to set BPJ limits for "each" or "every" chemical pollutant in a given wastestream. It says when an ELG applies to only "certain aspects of the discharger's operation, or to certain pollutants," then "other **aspects or activities** are **subject to** regulation on a case-by-case basis..."[11] Thus, it refers to "aspects or activities" of a discharger's operations (not individual "pollutants") being "subject to" BPJ limits, which suggests permitting authorities have an option to impose BPJ limits when entire wastestreams or industrial processes are not covered by the ELG, not that they have a mandatory duty to do so for every chemical in every wastestream.

---

[8] Opinion at 11-12. *See also* 40 C.F.R. §§ 423.11(b), 423.15(c) (as promulgated in 1982 at 47 Fed. Reg. at 52,395, 52,307 (Apx. G to LG&E Appellant's Br.)).
[9] Appellees' Br. at 18.
[10] *Id.* at 14.
[11] 40 C.F.R. §125.3(c)(3).

This is consistent with the EPA's own instruction in the NPDES Permit Writers Manual that BPJ limits should not be imposed for pollutants "considered" by EPA when promulgating the ELGs.[12] Appellees are incorrect that this guidance requires a finding by EPA that limits are "not necessary." The Permit Writers' Manual identifies a number of reasons why EPA may not set limits on a particular chemical compound, including the reason given in the 1982 ELGs – that the treatment technology selected by EPA as the basis for effluent limits does not effectively treat the pollutant.[13]

Nor does the June 7, 2010 informal and expressly non-binding EPA Hanlon Memo support Appellees' position. By its own terms, the Hanlon Memo applied prospectively only, and may not be applied to the prior-issued Trimble Permit.[14] The Memo's express non-retroactivity confirms it was understood by its author as an attempt to impose new requirements, rather than to confirm EPA's existing understanding, which is further corroborated by the fact that EPA did not object to the Trimble Permit when it was issued.[15] Kentucky law prohibits the Cabinet from modifying the requirements of promulgated regulations based on informal policy memoranda like the Hanlon Memo.[16]

---

[12] 2010 NPDES Permit Writers Manual at p. 5-18 (Apx. L to LG&E Appellant's Br.); 1996 NPDES Permit Writers Manual at p. 69 (Apx. M to LG&E Appellant's Br.).

[13] 2010 NPDES Permit Writers Manual at p. 5-18 (Apx. L to LG&E Appellant's Br.); 47 Fed. Reg. 52,290-01, 52,303 (Nov. 19, 1982) (Apx. G to LG&E Appellant's Br.).

[14] Hanlon Memo at p. 1 (Apx. 4 to Appellees' Br.) (memo applies to "NPDES permits issued between now and the effective date of revised effluent guidelines"). "[A]dministrative rules will not be construed to have retroactive effect unless their language requires this result." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). "Even where a rule merely narrows 'a range of possible interpretations' to a single 'precise interpretation,' it may change the legal landscape in a way that is impermissibly retroactive." *Arkema Inc. v. EPA*, 618 F.3d 1, 37 (D.C. Cir. 2010).

[15] Appellees' reliance on EPA objection letters to other permits issued after the Trimble Permit is also unavailing. First, these letters were not included in the Administrative Record, and cannot be considered on appeal. Second, the letters all post-date the Hanlon Memo and the Trimble Permit, and do not have any bearing on the validity of the prior-issued Trimble Permit. Third, the fact that EPA objected to other later-issued permits, but not the Trimble Permit, confirms that the Trimble Permit conformed to EPA's interpretation of the regulations at the time it was issued.

[16] KRS 13A.130; *Kerr v. Ky. State Bd. of Reg. for Prof. Eng'rs & Land Surveyors*, 797 S.W.2d 714, 717 (Ky. App. 1990). *See also Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013).

The Memo also does not address the "New Source" standards applicable to Trimble. The Memo focuses on the absence of limits on FGD wastewaters in the BAT standards applicable to "existing sources." But Trimble was subject to the stricter "new source" standards, which expressly limited FGD wastes as "low volume waste sources."[17]

Notably, the preamble to the 2015 revised ELGs does not mention the Hanlon Memo, or state that FGD wastewaters were required to be regulated by BPJ limits prior to the 2015 revision. To the contrary, the ELGs recognize that the predominant treatment technology in 2015 continued to be surface impoundments, and the plants that employed different treatment technology typically did so to comply with water-quality based standards, not ad hoc BPJ technology-based limits.[18]

Moreover, reviewing courts in other states, such as Tennessee and Illinois, have reached the opposite conclusion of Mr. Hanlon, concluding that BPJ limits are not required for toxic metals contained in wet scrubber wastewaters because those wastewaters are already subject to the 1982 ELG, and because EPA specifically considered whether to impose limits on those pollutants but chose not to do so.[19]

Appellees do not address those decisions at all, instead simply asserting that other states disagree. But the only decision Appellees cite is a single interlocutory administrative decision from Indiana, which actually supports LG&E's position.[20] The permit in that case did "**not** contain numeric limitations for the other toxic and

---

[17] *See* LG&E Appellant's Br. at pp. 6, 17 & n.19.
[18] 47 Fed. Reg. at 52,303 (Apx. G to LG&E Appellant's Br.).
[19] *NRDC v. Pollution Control Bd.*, 37 N.E.3d 407, 414 (Ill. App. Ct. 2015); *Tenn. Clean Water Network v. Tenn. Bd. of Water Quality, Oil & Gas*, No. 13-1742-I, at p. 2 & Appendix at pp. 8-10, 31-3 (Tenn. Chanc. Ct. Feb. 25, 2015) (Apx. N to LG&E Appellant's Br.); *Tenn. Clean Water Network v. Tenn. Bd. of Water Quality, Oil & Gas*, No. 14-1577-I (Tenn. Chanc. Ct. Feb. 25, 2015) (Apx. O to LG&E Appellant's Br.).
[20] *In re Objection to Issuance of NPDES Permit No. IN0001759 to Ind. Ky. Elec. Corp. Clifty Creek Plant*, No. 12-W-J-4541 (Ind. Office of Envt'l Adjudication May 1, 2014) (Apx. 9 to Appellees' Br.).

nonconventional pollutants" in FGD wastes.[21] Sierra Club argued numeric limits for toxic pollutants were required, but the Indiana decision **denied** Sierra Club's motion for summary judgment on that issue.[22] While the permitting agency used best professional judgment to identify physical/chemical treatment as the BAT for the plant's FGD wastes, no party challenged the agency's use of BPJ permitting, so the issue was not in dispute.

The Cabinet's view does not nullify 40 C.F.R. § 125.3(c)(3). A combination of ELG and BPJ limits as contemplated in Subsection (3) may be employed when there is an entire aspect of the discharger's operations or an entire wastestream that is not addressed in the ELG. But Subsection (3) does not require supplemental BPJ limits to be imposed any time an ELG fails to set limits for every chemical present in a wastestream that is already regulated by the ELG. It is Appellees' interpretation that renders Subsection (1) a nullity, since EPA never sets limits for every chemical in a discharge, so the Cabinet could never simply apply the ELG as written under Subsection (1).

III. The Majority Opinion places an impossible burden on states and destroys the uniformity of nationwide ELGs.

The Majority's construction of the CWA imposes impossible burdens on the Cabinet and casts a cloud of uncertainty over every CWA permit that applies a national ELG. The Majority Opinion holds that the language of 40 CFR § 125.3, by itself, creates a mandatory duty to impose additional BPJ limits whenever an ELG regulates "certain pollutants" in a wastestream, but not others.

That holding overlooks the fact that ELGs **never** prescribe numeric limits for every pollutant in a wastestream. That is true of toxic pollutants, no less than any other

---

[21] *Id.* at pp.11-12, ¶ 7 (emphasis added).
[22] *Id.* at p. 12, ¶¶ 8-11.

kind.[23] Indeed, EPA has stated "it is **impossible** to identify and rationally limit every chemical or compound present in a discharge of pollutants."[24] Thus, the Majority would require states to impose ad hoc BPJ limits for **every** permit subject to an ELG, since no ELG sets limits for every known constituent pollutant.

The reach of the Majority Opinion is not confined to the "limited facts" of this case, as Appellees claim. The Majority did not rest its holding on the age of the ELGs, the volume of LG&E's discharges, or the efficacy of alternative treatment technologies. The Majority held (incorrectly) that the "clear" language of 40 CFR 125.3(c)(3) "expressly instructs" that when an ELG "only applie[s] 'to certain pollutants,' ... a case-by-case review is **required**" for any pollutants not expressly limited in the ELG. The Majority rejected any suggestion that imposition of BPJ limits was "discretionary and not mandatory."[25] Thus, the Majority rooted the mandatory obligation to perform supplemental BPJ analyses solely in the plain language of the regulation, which does not make any reference to the factual considerations emphasized by Appellees.

Appellees' analysis of the regulations is no less sweeping. Throughout their brief, Appellees repeatedly assert "as a matter of law" that "the plain language of the governing regulations at 40 C.F.R. § 125.3(c)(2)&(3) ... explicitly state[s] that the permitting authority **must** set case-by-case limits ... where the guidelines do not apply to all aspects of the discharge or to **all** pollutants,"[26] and that "**each** pollutant discharged" must be subject to a technology-based limit established by either an ELG or a BPJ analysis.[27] It is

---

[23] "EPA ... frequently does not impose specific effluent guidelines for certain pollutants, **especially in regulating toxics**...." *NRDC*, 822 F.2d at 125 (emphasis added).
[24] *Sierra Club v. ICG Hazard, LLC*, 781 F.3d 281, 287-88 (6th Cir. 2015) (quoting *In re Ketchikan Pulp Co.*, 7 E.A.D. 605, 1998 WL 284964, at *9 (E.P.A. May 15, 1998)).
[25] Opinion at 14 (emphasis added).
[26] Appellees' Br. at 18 (emphasis added).
[27] *Id.* at 14 (emphasis added).

only when confronted by the sweeping implications of their interpretation that Appellees attempt to assuage the Court with factual limitations. But if those factual limits are not connected in any way to the regulatory interpretation that must be adopted to reach Appellees' desired result, they cannot meaningfully limit the reach of the Opinion.

The absence of any regulatory or statutory basis for Appellees' proposed factual limits also leaves the Court without any meaningful standards for applying them. Appellees give the Court no standards regarding just how old an ELG must be, or how well developed superior treatment technologies must become, before a mandatory obligation to set BPJ limits arises. Also, numerous ELGs have not been updated since the 1980's,[28] so the age of the 1982 ELG is not a factor unique to this case.

Nor is there merit to Appellees' assertion that mandatory BPJs must not be overly burdensome, because the Cabinet allegedly claimed to have performed one. Appellees mischaracterize the Cabinet's alternative argument below, which was that, even if one reads 40 C.F.R. § 125.3 to require application of the BPJ regulation, the language of the BPJ regulation allows consideration of "unique factors," which could reasonably permit the state to decline to set any new BPJ limits based on consideration of a "unique factor" such as the impending newly revised ELGs.[29] The Cabinet did not claim to have performed a BPJ analysis mirroring the scientific, technological, and economic analysis EPA performs when selecting best available technology and setting corresponding effluent limits, which is what the Majority Opinion would require the Cabinet to do in every permit for every pollutant not specifically regulated in an ELG. That is impossible.

The Majority's interpretation of the CWA would utterly destroy national ELGs'

---

[28] *See* LG&E Appellant's Br. at p.34, n. 62.
[29] 40 C.F.R.§ 125.3(c)(2). *See also* LG&E Court of Appeals Br. at p. 22.

"primary purpose ... to provide uniformity."[30] Every permit applying a national ELG would have to be overlaid with ad hoc BPJ limits, which by the nature of the BPJ process would vary from state to state, facility to facility. "[C]ontinu[ing] to rely upon the issuance of [BPJ] permits with varying standards[] is thus at odds with the expressly stated goals of the legislation."[31] Appellees' argument that uniformity is not an absolute requirement under the CWA does not justify the total abandonment of that goal.

IV. The Cabinet's statutory interpretation is entitled to deference.

Under Kentucky law, the Cabinet's interpretation of the CWA and KPDES statutes and regulations are entitled to deference so long as they reflect a permissible interpretation, even if the Court would adopt a different interpretation *de novo*.[32] Appellees claim the regulations are unambiguous, but saying it does not make it so, and the foregoing makes clear that the Cabinet's interpretation is a permissible one.

The fact that Kentucky law incorporates federal statutes and regulations does not deprive the Cabinet of deference. *Gonzales v. Oregon* merely holds that when a regulation parrots a statute, an agency's interpretation of the parroting regulation is only entitled to the deference afforded to an agency's statutory interpretations under *Chevron*, not the greater deference afforded to an agency's interpretation of its own regulations.[33]

Alaska Dep't of Envtl. Conservation v. EPA[34] construed EPA's authority to challenge a state's BACT analysis under a specific provision of the Clean Air Act, which has no relevance here. It does not hold that a state agency charged with applying a federal

---

[30] *NRDC v. Costle*, 568 F.2d 1369, 1378 (D.C. Cir. 1977).
[31] *NRDC*, 437 F. Supp. 2d at 1160.
[32] *E.g., Pub. Serv. Comm'n of Ky. v. Commonwealth*, 320 S.W.3d 660, 668 (Ky. 2010); *Commonwealth, Energy & Env't Cabinet v. Sharp*, 2012 WL 1889307, at *10 (Ky. App. May 25, 2012, as modified Nov. 30, 2012) (copy attached as Ex. P to LG&E Appellant's Br.) (KPDES).
[33] 546 U.S. 243 (2006).
[34] 540 U.S. 461 (2004).

regulatory regime is not entitled to any deference. Also, unlike the *Alaska* case, EPA did not challenge the Cabinet's issuance of the Trimble Permit, and the Cabinet's position is consistent with EPA's Permit Writers' Manual. It is entitled to deference.

VI. Appellees' position is in conflict with the 2015 ELGs.

Appellees claim that if a BPJ is ordered, the Cabinet should apply the limits set forth in the 2015 ELG, but Appellees would have the Cabinet disregard the ELGs' express instruction that those limits not be applied until as soon as possible after November 1, 2018. That is untenable. After years of study and consideration of the economic and technical factors set forth in the CWA, EPA determined in 2015 that the BAT standards should require existing facilities to continue to comply with the 1982 ELGs' standards for FGD wastewaters until November 1, 2018, after which the additional limits on toxic metals should apply. There is no reason why the Cabinet, if ordered to perform a BPJ analysis by this Court, should reach a different conclusion.

Certainly, clear statutory and regulatory directives may not be disregarded to compensate for the Cabinet's delays in issuing permits. Moreover, imposing impossible new burdens on the Cabinet to perform in-depth BPJ studies for every new permit it issues will exacerbate – not mitigate – the problem of delays.

VII. The Franklin Circuit Court lacked subject matter jurisdiction.

Under Kentucky law, **all** statutory requirements for administrative appeals are jurisdictional, and lack of jurisdiction cannot be excused as "harmless error."[35] None of the cases cited by Appellees involve administrative appeals. Appellees did not comply with KRS 224.10-470(1), so the circuit court orders are void *ab initio*.

[35] *LG&E v. Hardin & Meade County Prop. Owners for Co-Location*, 319 S.W.3d 397, 400 (Ky. 2010).